No. 92-741

In the Supreme Court of the United States

OCTOBER TERM, 1992

FEDERAL DEPOSIT INSURANCE CORPORATION, PETITIONER

v.

JOHN H. MEYER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-741

FEDERAL DEPOSIT INSURANCE CORPORATION, PETITIONER

v.

JOHN H. MEYER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION

---

1. The court of appeals found that respondent was entitled to recover $130,000 because FSLIC terminated his employment without a hearing. Respondent does not dispute that this ruling is unprecedented: no court of appeals has ever before held that a federal agency may be sued under a *Bivens* cause of action. Respondent argues, however, that the court of appeals' legal determination that sue-and-be-sued agencies can be held liable for constitutional torts on a *Bivens* theory is correct, does not conflict with other decisions of the courts of appeals, and poses no threat to the ability of federal banking agencies to

perform their statutory functions or to the federal fisc generally.[1]

a. Respondent essentially follows the court of appeals' reasoning in defending its holding that the FTCA does not provide an exclusive remedy for constitutional torts because such torts are not "cognizable" under the FTCA. For the reasons given in the petition (Pet. 9-15), this holding is inconsistent with well-settled legal principles governing the interpretation and coverage of the FTCA.

Respondent further argues (Br. in Opp. 8) that the decision of the court of appeals does not conflict with the decision of the Eighth Circuit in *Peak* v. *SBA*, 660 F.2d 375 (8th Cir. 1981), because *Peak* did not involve a *Bivens* claim. That is true. But respondent does not even attempt to explain why that would make any difference under the Eighth Circuit's interpretation of the FTCA. A comparison of the two cases confirms that the Eighth Circuit would have dismissed respondent's claims under its holding in *Peak*.

In *Peak*, the plaintiff asserted a strict liability claim against a sue-and-be-sued agency. Like the

[1] Respondent states that Fidelity "experienced severe financial difficulties but never became insolvent prior to when it was placed under federal receivership." Br. in Opp. 2. According to a joint stipulation entered into before trial, Fidelity had a net worth of $19,600,000 as of March 31, 1982, and was losing an average of $5,000,000 per month. C.A. Supp. Rec. Exc. 89. By March 1982, it had borrowed more than $1.3 billion from the Federal Home Loan Bank of San Francisco. *Ibid.* During the first week of April 1982, depositors withdrew nearly $70,000,000 in deposits. *Ibid.* Fidelity was placed into federal receivership on April 13, 1982. *Ibid.*

Bivens claim in this case, such a claim does not fall within any of the expressly denominated "exceptions" to the FTCA enumerated in 28 U.S.C. 2680(a), but was instead barred by the FTCA's basic jurisdictional provision, 28 U.S.C. 1346(b). According to the Ninth Circuit, the fact that the claim in this case is barred by Section 1346(b) means that it is only "implicitly" excluded from the FTCA and therefore is not "cognizable" under the statute. See 28 U.S.C. 2679(a). The identical argument was made by the plaintiff in *Peak*. 660 F.2d at 378. Unlike the Ninth Circuit in this case, however, the Eighth Circuit squarely *rejected* the plaintiff's argument, holding that the "practical effect * * * is the same as if Congress had included [the Section 1346(b) bar] as an exemption under section 2680." *Ibid.* Based on that holding, the Eighth Circuit concluded in *Peak* that the case could be brought only under the FTCA or not at all. There is nothing in the opinion of the Eighth Circuit, or its legal reasoning, to suggest that only some, but not all, tort claims barred by Section 1346 are cognizable under the FTCA. Accordingly, the Eighth Circuit's decision in *Peak* is in conflict with the Ninth Circuit's decision in this case.

Respondent also argues (Br. in Opp. 8) that there is no conflict between the court of appeals' decision in this case and the decisions of a number of other courts of appeals that have held that *Bivens* actions may not be brought directly against sue-and-be-sued agencies. Respondent asserts that *Ascot Dinner Theatre, Ltd.* v. *SBA*, 887 F.2d 1024 (10th Cir. 1989), is not in conflict because the court did not expressly decide whether the action in that case was

"cognizable" under the FTCA. As we explained in our petition, however, the analysis in *Ascot Dinner Theatre* demonstrates that the Tenth Circuit would not permit this action to be brought directly against FSLIC, a result in direct conflict with the result reached by the Ninth Circuit in this case. See Pet. 14-15.

Contemporary Mission, Inc. v. *United States Postal Service*, 648 F.2d 97, 105 n.9 (2d Cir. 1981), and *McCollum* v. *Bolger*, 794 F.2d 602, 608 (11th Cir. 1986), cert. denied, 479 U.S. 1034 (1987), involved the United States Postal Service, whose organic statute differs in some respects from that of FSLIC. Although respondent is correct (Br. in Opp. 8) that the Ninth Circuit in this case attempted to distinguish *Contemporary Mission* and *McCollum*, the court's distinction is unconvincing for the reasons set forth in the petition. See Pet. 15 n.10.

b. We explain in the petition (Pet. 16-18) that, even aside from the FTCA's exclusive remedy provision, respondent could not rely on the agency's sue-and-be-sued clause as a waiver of sovereign immunity for this claim. Respondent does not dispute our conclusion (Pet. 17-18) that suits of the type at issue in this case would be inconsistent with Congress's decision, in enacting the discretionary function exception to the FTCA, 28 U.S.C. 2680(a), not to subject policy decisions by federal agencies to after-the-fact judicial review via the mechanism of a tort suit. See *United States* v. *Gaubert*, 111 S. Ct. 1267, 1277 (1991). Indeed, respondent neither cites nor discusses the discretionary function exception, which provides a clear indication that Congress did not intend to permit

direct actions against federal agencies for claims of this type.

c. We also explain in the petition (Pet. 18-20) that this Court in *Bivens* itself noted that direct impact on the federal fisc was the primary example of a "special factor[] counselling hesitation" before implying a *Bivens* cause of action. See *Bivens* v. *Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396 (1971). That fact, among others, strongly militates against implying a cause of action directly against the federal agency in this case.

Respondent's contentions to the contrary are unconvincing. Although it is true that "[a]gencies such as FDIC have budgets and experience operating successes and failures," Br. in Opp. 12, respondent seeks a judgment in this case that would run directly against the agency and that would thus have a direct impact on public funds. Indeed, in light of the recent, much-publicized use of public funds to supplement the savings and loan insurance fund, respondent's claim that a suit seeking a money judgment against the FDIC has no effect on the federal fisc is puzzling.[2]

Respondent's argument (Br. in Opp. 12) that a judgment against FDIC in this case would have no more fiscal impact than judgments against federal officials who are indemnified by the government also misses the point. Where such indemnity is author-

---

[2] Under 12 U.S.C. 1821a(a) (Supp. II 1990), the FSLIC Resolution Fund was funded by FSLIC's remaining assets and substantial public funds and borrowings, see 12 U.S.C. 1821a(b) (Supp. II 1990), to pay, *inter alia*, "[a]ny judgment resulting from a proceeding to which [FSLIC] was a party prior to its dissolution." 12 U.S.C. 1821a(d) (Supp. II 1990).

ized—and, as respondent concedes (*ibid.*), it is never absolute—it represents a decision by Congress or an agency acting within its delegated authority that such indemnity is an appropriate way to expend public funds. The fact that public funds are expended on other, authorized purposes—including indemnification of federal officials in some *Bivens* actions—provides no support for respondent's claim that spending such funds on judgments in cases like this would not have an untoward impact on the federal fisc.

In addition, respondent's claim that the fiscal impact of the *Bivens* remedy recognized in this case is no different from the impact of the *Bivens* remedy recognized against individual officials is belied by the judgment in this very case. The individual official was found to be immune from suit, but the agency was nevertheless held liable. The availability of qualified immunity for official acts has substantially limited the fiscal impact of the more limited *Bivens* remedy previously recognized. *Bivens* claims against agencies could dramatically increase that liability.

2. We demonstrate in the petition (Pet. 23-25) that respondent's employment rights as against a federal receiver are governed by federal—not state—law, and that federal law does not recognize any right to continued employment in the context of this case. It follows that respondent was deprived of no property interest when he was dismissed. Respondent does not appear to address that argument.

Respondent does argue (Br. in Opp. 13) that federal regulations that grant the receiver authority to "[r]eject or repudiate any lease or contract which it consider[ed] burdensome," 12 C.F.R. 569a.6(c)(3)

(1982), should be construed to provide for a hearing before any such contract or lease is repudiated. That contention demonstrates the severe impact of the court of appeals' decision in this case. Respondent's argument would apply to *any* party who could claim to have an express or, as in respondent's case, implied contract with a financial institution in receivership that was not fully performed at the time the receiver was appointed. Under respondent's argument, any such party would have a right to a hearing concerning whether its contract should be repudiated. To recognize that right would be inconsistent with settled principles giving receivers the near-absolute discretion to repudiate executory contracts. See, *e.g.*, Pet. 24 n.14 (citing cases). It would also add an entirely new layer of complexity, not contemplated by Congress, to the receiver's already difficult task of resolving receiverships quickly and efficiently, at the least cost to the federal fisc and to public confidence in the banking system.

Respondent also disputes (Br. in Opp. 14-15) our alternative claim that he was not denied any possible property interest in continued employment, because he retained the right, like any other creditor of his employer, to pursue a claim against his employer's estate. He argues that "[t]he claim procedure that might otherwise have given [him] some right to relief was never instituted" in connection with the Fidelity receivership (*ibid.*) because FSLIC never published "notice to all creditors * * * to present their claims with proof thereof * * * on forms prescribed by the Receiver on or before a date specified in such notice." 12 C.F.R. 569a.8(a) (1982).

Respondent is mistaken in contending that FSLIC's failure to publish notice of the claims procedure establishes that his summary termination violated the Due Process Clause. Respondent retained distinct remedies for the receiver's failure to publish the notice contemplated by the regulation. Respondent could have simply submitted his claim to the receiver for action. Moreover, respondent retained the right to bring suit on his claim for breach of his alleged implied contract for continued employment.[3] Thus, insofar as his alleged implied contractual right to continued employment survived the appointment of the federal receiver, it was transformed—like the claim of any other contractual partner of Fidelity—into a claim against Fidelity's estate.[4] Because he was not deprived of that claim, he

was not deprived of any property interest within the meaning of the Due Process Clause.

Respondent's arguments therefore reduce to the proposition that breach of a contract by a federal agency—even if authorized, as here, by valid regulations—violates the Due Process Clause unless the party whose contract is breached has been afforded the panoply of procedural due process protections. In our view, that conclusion is indeed a necessary consequence of the court of appeals' decision in this case and threatens a dramatic and inappropriate constitutionalization of federal contract law. For that reason, as well as for the reasons stated in our petition, further review is warranted.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

FEBRUARY 1993

---

[3] Count VIII of Respondent's First Amended Complaint pleaded that the defendants in this case had "breached the implied covenant in plaintiff's employment contract * * * that plaintiff would not be terminated without just cause." C.A. Rec. Exc. 11. FSLIC's trial counsel argued in moving to dismiss the complaint that only the Claims Court would have jurisdiction over that breach of contract claim under 28 U.S.C. 1346(a)(2) and 1491(a)(1). We now believe that view to have been erroneous, in light of the sue-and-be-sued clause in FSLIC's charter. In any event, respondent neither filed suit in the Claims Court nor continued to litigate the issue of the district court's jurisdiction over his claim for breach of contract, even though the district court never ruled on that jurisdictional issue. Instead, respondent simply dropped the breach of contract claim when he filed his Second Amended Complaint. See C.A. Supp. Rec. Exc. 1-19.

[4] Although suit on such a claim ordinarily could not have been maintained unless respondent had previously submitted it to the receiver, this Court has held that failure to submit a claim to the receiver is excused if the claims process is inadequate. *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561, 579-587 (1989).